APPEAL NO. 052648
FILED JANUARY 18, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 27, 2005. The hearing officer determined that the compensable injury of ___, extends to and includes bulging discs at C4-5 and C5-6, but that the compensable injury does not extend to or include protruding discs at C2-3 or C3-4. The hearing officer's determination that the compensable injury did not extend to the protruding discs at C2-3 and C3-4 has not been appealed and has become final.

The appellant (carrier) appeals the extent of injury to the C4-5 and C5-6 discs, contending that early diagnostic testing indicated an absence of bulging discs and that the subsequent appearance of the disc bulges was due to degenerative changes. The file does not contain a response from the respondent (claimant).

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury in the form of a cervical sprain/strain and a left shoulder injury on ___. It is undisputed that the claimant had left shoulder surgery in January 2002, October 2003, and January 2004. In evidence is a doctor's report dated April 21, 1999, indicating normal cervical range of motion (ROM), and diagnosing a left trapezius strain. A cervical spine MRI performed on May 27, 1999, indicated;

> No abnormal vertebral marrow signals are present. No compression fractures are present. The intervertebral discs are well hydrated at all levels, and no disc bulge or herniation is present at any level. No lateralizing defects are present. No cord compression is noted at any level. No abnormal cord signal is present.

The impression was "[n]o disc bulge, herniation or lateralizing defects at any level." A consultation report dated June 17, 1999, by (Dr. B) notes the MRI report, comments that cervical ROM is within normal limits and has a clinical impression of a cervical strain "with no objective clinical findings today." In another consultation report dated August 24, 1999, (Dr. N) noted the MRI (but did not have a copy) and performed an EMG nerve condition velocity (NCV) test which indicates chronic "C5-6 radiculopathy on the left upper extremity." Dr. N commented that he did not have the MRI of the cervical spine and that there "is some radicular component which certainly can be neck and/or shoulder in origin." The hearing officer cites this report of "C5-6 radiculopathy in the left upper extremity" as early evidence of bulging discs at C5-6. We note that the doctor, in that report, said the radicular component "can be neck and/or shoulder" and that the claimant subsequently had left shoulder surgery in 2002, 2003, and 2004. No mention

is made of bulging discs in that report. A report dated June 16, 2000, notes left C5 radiculopathy "but no herniated disk."

The first mention of a C5-6 disc bulge is in a "post-myelogram cervical CT" of August 8, 2000 (some 16 months after the date of injury). That report showed no herniations and "[d]iffuse 1-2 mm posterior annular bulging" at C5-6 (none at C4-5). The first mention of bulging discs at C4-5 is a cervical MRI performed on May 23, 2001 (over two years after the date of injury) which found "C3-4: Normal" and "C4-5: Mild cervical spondylosis characterized by annular disc bulge and a superimposed small posterior central minimal disc protrusion . . . without evidence of cord flattering or spinal stenosis." C5-6 was "Normal." The impression was "mild C4-5 spondylosis without evidence of spinal stenosis or neural foraminal stenosis."

A cervical discogram performed on December 20, 2002, "showed bulging and degenerative [disc] at C5-6." A cervical MRI scan performed on November 3, 2004, showed very mild disc dehydration at C4-5 and "no disc herniation or bulging" at C5-6. Another cervical myelogram with post myelogram CT scan performed February 11, 2005 (over five and a half years post injury) showed a small 1-2 mm protrusion at C3-4 and C4-5 but none at C5-6. A report dated May 6, 2005, from Dr. N comments that the claimant has "clear documentation of radiculopathy on the left side, as related to this injury that happened in ___. The patient did not have those symptoms before he got hurt at work." The claimant presents a "Letter of Causation" dated June 20, 2005 (six years after the injury) from the claimant's current treating doctor, to show that the C4-5 disc bulge was directly related to the compensable injury. (The letter also discusses bulging at C2-3 and C3-4). The letter discusses the circumstances of how the claimant was injured, testing that was done and concludes "it is obvious from the mechanism injury on the initial date of injury that [the claimant] sustained structural damage to the cervical spine and rotator cuff of the shoulder." The causation letter makes no reference to disc bulges at C5-6.

The hearing officer in the Background Information portion of his decision cites the CT scan of August 8, 2000, the EMG of August 24, 1999, and the MRI of May 23, 2001, to "establish that disc pathology was detected at C4-5 and C5-6 within the first two years after the accident." The hearing officer comments that because of the complaints of pain "beyond the normal healing time for a cervical sprain/strain, it is clear that the claimant had sustained more than a soft tissue injury." True or not, we note that the issue before the hearing officer was whether the compensable injury included disc bulges at C4-5 and C5-6, not whether the claimant's injury was limited to a soft tissue injury. The hearing officer goes on to explain;

> The preponderance of the credible evidence in this case establishes that the claimant's on-the-job accident caused or aggravated the claimant's bulging discs at C4-5 and C5-6. Because the protruding discs at C2-3 and C3-4 were first discovered in November 2004 (more than five years after the accident), the evidence presented by the claimant is insufficient to establish a casual connection between the accident and the disc

pathology. Because of the passage of time, it is more likely that the disc pathology at C2-3 and C3-4 was the result of degenerative changes.

The hearing officer in his explanation appears to base his decision, and give greater weight, on the reports "within the first two years after the accident" and reports that first address disc pathology after that were "more likely . . . the result of degenerative changes." This being the case we are perplexed that the hearing officer does not even mention, much less explain, the cervical spine MRI performed on May 27, 1999, showing no disc bulges, herniations or lateralizing defects at any level, the medical report of April 21, 1999, showing normal ROM and the June 17, 1999, consultant report showing no objective clinical findings. Instead the hearing officer references an August 8, 2000, report (16 months after the injury) and a May 23, 2001, report (more than two years and one month after the injury) to support his decision that the compensable injury includes the C4-5 and C5-6 disc bulges. There is no medical evidence to establish that the claimant had bulging discs at the time of the injury or shortly thereafter, therefore it is difficult to see how the compensable injury either "caused or aggravated the claimant's bulging disc at C4-5 and C5-6" (Finding of Fact No. 4). The letters/reports that purport to establish causation were not written until 2005, over five years after the injury. In view of the fact that the hearing officer indicated that he was giving greater weight to reports more contemporaneous to the injury ("within the first two years after the accident") we remand the case for the hearing officer's comment on the early reports made within a few months of the date of injury and citation to expert medical evidence how the compensable injury naturally progressed from no evidence of bulging discs in 1999 to later diagnosed bulging discs at C4-5 and C5-6. In the absence of such expert medical evidence the claimant has not met his burden of proof.

We are cognizant that the Appeals Panel has frequently stated that there is no requirement that the hearing officer discuss all the evidence. Appeals Panel Decision (APD) 91076, decided December 31, 1991; APD 042279, decided October 28, 2004. However, a statement of evidence as presented in the Background Information portion needs to reasonably and accurately reflect the record. APD 041438, decided July 29, 2004. Where, as in this case, the hearing officer states that he is relying on "the claimant's early medical treatment" (as opposed to records "more than 5 years after the accident") omission in his discussion of records made in the first few months after the injury while emphasizing records 16 months and two years and 1 month after the injury warrant further reference to medical evidence to establish causation and to support his decision.

In addition, we note that the record consisted of two audio CD's. In the first disc the claimant is called and was testifying on direct examination regarding various medical reports. At track 22:43 the ombudsman passes the witness and at track 22:46 the hearing officer asks some questions about the dates of various reports. At track 22:59 the CD abruptly shuts off in mid-sentence. The second disc begins with the hearing officer stating that there was a disc error in disc 1 and that he was asking about when certain conditions were first mentioned in the records. There appears to be a natural continuation of the hearing. After the hearing officer finishes his questions at

disc 2, track 1:25 he asks for closing statements. Both the claimant and the carrier give closing statements. However, it does not appear that the carrier was given an opportunity to cross-examine the claimant, or if it did, whether the cross-examination was lost in the disc 1 error. In the remand the hearing officer should address whether the carrier did in fact cross-examine the claimant or waived cross-examination and, if not, afford the carrier an opportunity to do so. If the cross-examination was lost, the record needs to be reconstructed.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **TRUCK INSURANCE EXCHANGE** and the name and address of its registered agent for service of process is

FRED B. WERKENTHIN
100 CONGRESS AVENUE
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge